Office-Supreme Court, U. S.
FILED
OCT 24 1951
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 399

ALEJANDRO PABELLON,
Plaintiff-Respondent,

against

GRACE LINE INC.,
Defendant and Third Party Plaintiff-Respondent,

against

COSTON SUPPLY COMPANY, RUDMAN & SCOFIELD, INC., DURKEE COMPANY, INC., DEARBORN CHEMICAL CO., OAKITE COMPANY and SWIFT & CO.,
Third Party Defendants-Petitioners,

and

RUDMAN & SCOFIELD, INC.,
Fourth Party Plaintiff-Petitioner,

against

McKESSON & ROBBINS INCORPORATED and OLD BURY ELECTRO-CHEMICAL CO.,
Fourth Party Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF

LOWELL WADMOND,
Counsel for Petitioners.

LOWELL WADMOND,
DAVID HARTFIELD, JR.,
DONALD CRONSON,
JOHN W. BURKE, JR.,
BURTON H. BRODY,
EARLE J. STARKEY,
VINCENT A. CATOGGIO,
PAUL M. KLEIN,
WILBUR M. JONES,
I. ARNOLD ROSS
WALTER E. WARNER, JR.,
BERNARD GOSTKOWSKI,
Of Counsel.

TABLE OF CONTENTS

	PAGE
PETITION	1
Summary and Statement of the Matter Involved	2
Basis of Jurisdiction	3
Questions Presented	3
Reasons for the Allowance of the Writ—Importance of the Questions Presented	4
PETITIONERS' BRIEF	7
Opinions of the Court Below	8
Basis of Jurisdiction	8
Statement of the Case	8
Specification of Errors	9
Summary of Arguments	9
POINT I—A vendor does not impliedly warrant that the product sold by him may be safely mixed with four other products over whose manufacture he has no control	10
POINT II—No duty exists on the part of a manufacturer to warn of the consequences, if any, resulting from the mixing of his product with four other products over whose manufacture he has no control—local decisions are in conflict with the Circuit Court's holding below	15

PAGE

A. The Third and Fourth Party Defendants Violated no Duty, or Obligation, Requiring them to Conform to any Standard of Conduct for the Protection of Others against Unreasonable Risk. (Prosser's First Element.) 16

B. The Accident Did Not Have Such a Reasonably Close Causal Connection with the Injury as to Make any Manufacturing Third Party Defendant's Conduct the Proximate Cause of the Alleged Injury. (Prosser's Third Element.) 20

C. Local Law is in Conflict With the Opinion Below 24

D. The Only "Mixing" Case in the Second Circuit is Distinguishable 25

POINT III—In an action under the Jones Act, a third party plaintiff cannot implead third party defendants whose liability is governed by different rules of law 26

POINT IV—The judgment below should be reversed in all respects 30

Table of Cases

Ader *v.* Blau, 241 N. Y. 7 (1925) 29
American Mutual Liability Insurance Co. *v.* Matthews, 182 F. 2d 322 (1950) 28
Barchan & MacFarland, Inc. *v.* Kane, 228 App. Div. 396 (4th Dept., 1930) 14
Becker *v.* Waterman Steamship Corporation, 179 F. (2d) 713 (C.A. 2nd, 1950) 27
Bencoe *v.* McGraw, 208 N. Y. Supp. 4 (1st Dept., 1925) 14
Bird *v.* St. Paul, 224 N. Y. 47 22
Boyd *v.* American Can Co., 249 App. Div. 644 (2nd Dept., 1936) 24

PAGE

Collela *v.* Smith Fredenburg, 239 App. Div. 274 (4th Dept., 1933), aff'd 266 N. Y. 641 14
Cosmopolitan Co. *v.* McAllister, 337 U. S. 783 (1949) 27

Davidson *v.* Nichols, 11 Allen 514 (1866) 25

Ellen *v.* Heacock, 247 App. Div. 476 (4th Dept., 1936) 14
Erie R. Co. *v.* Erie Transportation Co., 204 U. S. 220, 27 S. Ct. 246, 51 L. Ed. 450 28

Grant Manufacturing Company *v.* Yates-American Machines, 111 Fed. (2d) 360 (C.A. 8th Cir., 1940) 13

Heaven *v.* Pender, 11 Q.B.D. 503 (C. A. 1882) 18
Howard *v.* Hoey, 23 Wend. 350 13
Huset *v.* J. I. Case, 120 Fed. 865 18

Kalfayan *v.* Companie Francais de Navigation a Vapeur, 257 N. Y. 572 22
Kalinowski *v.* Joseph T. Ryerson & Son, 272 N. Y. S. 759 (App. Div. 4th Dept., 1934) 17, 21
Korn *v.* Capital Hall, Inc., 69 N. Y. S. (2d) 248 (App. Term, 1st Dept., 1947) 17, 21

Lehigh Valley R. Co. *v.* Cornell Steamboat Co., 218 U. S. 264, 31 S. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas. 1235 28

MacPherson *v.* Buick Motor Co., 217 N. Y. 382 ..... 17, 18, 21, 22
McNeil & Higgins *v.* Czarnikow-Rienda, 274 Fed. 397 (D.C. S.D. N. Y. 1921) 13
Morril *v.* Morril, 104 N. J. L. 557, 142 A. 337 17

Odgis *v.* Popock, 91 N. Y. S. (2d) 410 (Sup. Ct., 1949) 20
The Osceola, 189 U. S. 158 (1903) 27

Palsgraf *v.* Long Island Rail Road Co., 248 N. Y. 339 17
Pease *v.* Sinclair Refining Co., 104 Fed. (2d) 183 (C.C.A. 2nd, 1941) 25, 26
Porello *v.* United States, 2 Cir., 153 F. 2d 605 29

Quill *v.* Empire State Telephone & Telegraph Co., 159 N. Y. 1 23

PAGE

Reiss *v.* Kirkman & Son, Inc., 242 App. Div. 77 23
Ryan *v.* Progressive Grocery Stores, Inc., 255 N. Y. 388 (1931) 14
Schfranek *v.* Benjamin Moore & Co., 54 Fed. (2d) 76 (D.C. S.D. N.Y. 1931) 22
Ship *v.* Friedenberg, 132 App. Div. 782 (1st Dept., 1909) 17, 21
Socony-Vacuum Oil Co. *v.* Smith, 305 U. S. 424 (1939) 27
Spaulding *v.* Parry Navigation Co., 90 F. Supp. 567 (S.D. N. Y. 1950) 29
Sure Seal Company *v.* Loeber, 171 App. Div. 225 (1st Dept., 1916) 14
Thomas *v.* Winchester, 6 N. Y. 397 17
Traynor *v.* United Cigar-Whelan Stores, 274 App. Div. 800 (2nd Dept., 1948) 25
Turner *v.* Edison Storage Battery Co., 248 N. Y. 73.... 13
Winterbottom *v.* Wright, 10 M. & W. 109 ..... 17, 18, 19
The Wonder, 2 Cir., 79 F. 2d 312 29

Other Citations

A. L. I. Restitution §86 28
Federal Employers Liability Act, 45 U. S. C. A. 53.... 27
Personal Property Law (Uniform Sales Act)
Section 96(1) 10
Section 96(4) 10
Prosser, The Implied Warranty of Merchantable Quality, 21 Can. Bar J. 446 (1943) 13
Prosser on Torts 16, 23, 28

Supreme Court of the United States
OCTOBER TERM, 1951

No.

ALEJANDRO PABELLON,
Plaintiff-Respondent,

against

GRACE LINE INC.,
Defendant and Third Party Plaintiff-Respondent,

against

COSTON SUPPLY COMPANY, RUDMAN & SCOFIELD, INC., DURKEE COMPANY, INC., DEARBORN CHEMICAL CO., OAKITE COMPANY and SWIFT & CO.,
Third Party Defendants-Petitioners,

and

RUDMAN & SCOFIELD, INC.,
Fourth Party Plaintiff-Petitioner,

against

MCKESSON & ROBBINS INCORPORATED and OLD BURY ELECTRO-CHEMICAL CO.,
Fourth Party Defendants-Petitioners.

PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices in the Supreme Court of the United States:

Petitioners respectfully pray for a writ of certiorari to review a decree of the United States Court of Appeals,

for the Second Circuit (R. 41)* which reversed a judgment of the United States District Court, for the Southern District of New York, wherein the District Court adjudged that the third party complaint of third party plaintiff, Grace Line Inc., should be dismissed on the ground that it failed to state a claim upon which relief could be granted.

Summary and Statement of the Matter Involved

Plaintiff was a seaman aboard third party plaintiff Grace Line's vessel "Santa Isabel" (R. 10). Allegedly plaintiff was injured while cleaning the deck by an explosion caused by his mixing together (1) lye, (2) oxalic acid, (3) a detergent called "Oakite," and (4) a soap powder called "Pride" (R. 10-15). The Grace Line having been sued, brought a third party complaint, containing three causes of action, against various third party defendants who either manufactured or sold to Grace Line the products which, having been mixed together by plaintiff, are alleged by Grace Line to have caused the explosion. The first cause of action sounds in breach of warranty and is directed against those who sold Grace Line one or the other of the products. The contention is that there was a breach of implied warranty of fitness of materials sold for cleaning purposes. The second cause of action sounds in tort for negligence and is directed against those who manufactured the products. The contention here is that there was negligence in failing to warn that the four products were dangerous when mixed. The third cause of action is for contribution and directed against all third party defendants. The District Court, on motion made by the third party defendants, dismissed the third party complaint. The Court of Appeals reversed the District Court and determined that the third party complaint stated a cause of action.

* Reference is made to pages in the Record.

Basis of Jurisdiction

It is respectfully submitted that this Court has jurisdiction to review the judgment or decree herein in question for the following reasons:

(a) There are involved here important questions of Federal law hitherto unpassed upon by this Court or other courts.

(b) The Court of Appeals for the Second Circuit has decided an important question of local law in conflict with applicable local decision.

(c) The conflict inherent in this case between the language and intent of the Jones Act, which limits actions to those between injured seamen and their employers, and the liberal third party practice provided in the Federal Rules of Civil Procedure require this Court's construction.

(d) The date of the decree of the United States Court of Appeals for the Second Circuit sought to be reviewed is July 26, 1951.

Questions Presented

Questions presented are as follows:

1. Does a manufacturer impliedly warrant that his product may be safely mixed with four other products over whose manufacture he has no control?

2. Does a duty exist on the part of a manufacturer to warn of the consequences, if any, resulting from the mixing of his product with four other products over whose manufacture he has no control?

3. Does the law of the State of New York conflict with the holding of the court below as to the liability of manu-

facturers and vendors in negligence and warranty under the circumstances mentioned above?

4. In an action under the Jones Act, may a third party plaintiff implead third party defendants whose liability is governed by different rules of law?

Reasons for the Allowance of the Writ—Importance of the Questions Presented

1. This Court has never passed on the question of the right of an employer in an action under the Jones Act to contribution from non-employer third parties whose negligence may have contributed to the injury and whose liability because of the absence of a master and servant relationship depends on different rules. In short, are defenses (ordinarily available to third parties) to be unavailable to these parties because the action was brought under the Jones Act?

2. The decision below that the complaint states a claim upon which relief can be granted is in conflict with the local law in that New York law does not hold a manufacturer liable in negligence or warranty when his products are indiscriminately mixed with other products. In other words, do manufacturers have a duty to chemically analyze all conceivable products with which a consumer could possibly mix his product?

The dangers of determining that manufacturers or vendors are to be liable in negligence or warranty for the indiscriminate mixing of many products with their products goes to the essence of the basic doctrines of negligence and warranty which form so important a part of the body of our commercial law.

An increasing number of actions under the Jones Act wherein employers seek to shift liability warrants this

Court in determining whether the authority to shift such liability should be in the courts or on Congress.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a transcript of the record and of the proceedings of said United States Court of Appeals for the Second Circuit, had in this case, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the decree herein of the said United States Court of Appeals for the Second Circuit be reviewed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

LOWELL WADMOND,
Counsel for Petitioners.

Supreme Court of the United States
OCTOBER TERM, 1951

No.

ALEJANDRO PABELLON,
Plaintiff-Respondent,

against

GRACE LINE INC.,
Defendant and Third Party Plaintiff-Respondent,

against

COSTON SUPPLY COMPANY, RUDMAN & SCOFIELD, INC., DURKEE COMPANY, INC., DEARBORN CHEMICAL CO., OAKITE COMPANY and SWIFT & CO.,
Third Party Defendants-Petitioners,

and

RUDMAN & SCOFIELD, INC.,
Fourth Party Plaintiff-Petitioner,

against

MCKESSON & ROBBINS INCORPORATED and OLD BURY ELECTRO-CHEMICAL CO.,
Fourth Party Defendants-Petitioners.

PETITIONERS' BRIEF

The third party and fourth party defendants, petitioners herein, apply for a writ of certiorari to the Supreme Court of the United States of America to review a decree of the

United States Court of Appeals for the Second Circuit (Hons. Harris B. Chase, Charles E. Clark and Jerome N. Frank, Circuit Judges) reversing a judgment of the United States District Court for the Southern District of New York (Conger, District Judge,) which dismissed the third party planitiff Grace Line's third party complaint.

Opinions of the Court Below

There was an opinion in the United States Court of Appeals for the Second Circuit (per Hon. Charles E. Clark, Circuit Judge,) which is reported at 191 F. (2d) 169. This opinion reversed the District Court for the Southern District of New York (Conger, J.), reported at 94 F. Supp. 989.

Basis of Jurisdiction

The basis of jurisdiction is set forth in the petition preceding this brief at page 3.

Statement of the Case

Plaintiff, a seaman aboard Grace Line's vessel "Santa Isabel" (R. 10), was allegedly injured while cleaning the deck by an explosion caused by his mixing together (1) lye, (2) oxalic acid, (3) a detergent called "Oakite," and (4) a soap powder called "Pride" (R. 10-15). The Grace Line, having been sued by Pabellon under the Jones Act for unseaworthiness and the General Maritime Law for maintenance and cure, brought a third party complaint, containing three causes of action, against various third party defendants who either manufactured or sold to Grace Line the products which, having been mixed together by the plaintiff, are alleged to have caused the explosion.

Specification of Errors

It is respectfully submitted that the Court of Appeals for the Second Circuit erred in reversing the judgment of the District Court and holding that the amended third party complaint stated a claim upon which relief can be granted.

Summary of Arguments

1. The first cause of action in the amended third party complaint does not state a claim upon which relief can be granted, because a vendor does not impliedly warrant that the product sold may be safely mixed with four other products over whose manufacture he has no control.

2. The second cause of action contained in the amended third party complaint does not state a claim upon which relief can be granted against the manufacturing third party defendants, because no duty exists on the part of a manufacturer to warn of the consequences, if any, resulting from the indiscriminate mixing of his product with four other products over whose manufacture he has no control because:

(a) The manufacturing third party and fourth party defendants violated no duty or obligation requiring them to conform to any standard of conduct for the protection of others against any unreasonable risk.

(b) The accident did not have such a reasonably close causal connection with the injury as to make any manufacturing third or fourth party defendant's conduct the proximate cause of the alleged injury.

(c) Decisions of the courts of the State of New York are in conflict with the Circuit Court's holding.

(d) The only "mixing" case in the Second Circuit is distinguishable from the instant case.

3. In an action under the Jones Act, a third party plaintiff cannot implead third party defendants whose liability is governed by different rules of law.

POINT I

A vendor does not impliedly warrant that the product sold by him may be safely mixed with four other products over whose manufacture he has no control.

Section 96(1) of the Personal Property Law (Uniform Sales Act) reads, in relevant part, as follows:

> "1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

Section 96(4) of the Personal Property Law (Uniform Sales Act) provides:

> "4. In the case of a contract to sell or a sale of a specific article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

The third party amended complaint purports to bring its remedy under subsection 1 of the law and to avoid the

effect of subsection 4. The position does not withstand analysis, since the amended complaint fails to plead a warranty cognizable under subdivision 1, or a breach thereof.

The third party complainant alleges that it purchased from the several third party defendants quantities of cleanser to be used in cleaning. In this circumstance, the maximum onus imposed upon a seller by Section 96(1) is that his product be "reasonably fit for such purpose" (cleaning). To obtain the benefit of a broader or different warranty, it is essential to plead that the buyer either expressly or impliedly made known to the seller the particular purpose for which the goods were required and thereafter relied upon the seller's skill and judgment in supplying them.

The complaint, however, giving it every fair extension of meaning, fails to allege any facts from which the adumbration may be sensed that the third party plaintiff made known to any of the third party defendants the "particular" purpose for which the purchase was made, to wit, the alleged purpose of mixing the products of all the third party defendants to form a compound cleansing agent. Nor is there any allegation in which the suggestion may be found that complainant in purchasing the products sold by the third party defendants relied upon the sellers' skill and judgment in supplying their products.

Thus, complainant suggests that the occurrences of purchase, use and injury indicate breach of warranty, but does not tell us why. Sequence does not mean consequence. Complainant has in effect pleaded warranty by each of the suppliers that *its* product was fit and *safe for use as a cleanser* and has followed by pleading the breach of an entirely different warranty, a particular warranty, a warranty that could be pleaded only as an express one and not subsumed under Section 96(1), to wit, that the third party

defendants and each of them impliedly warranted that their products were fit and safe for cleaning purposes "when mixed together or brought in contact with" each of the other products supplied by the other third party defendants. Courts do not ordinarily sustain complaints which allege the making of one contract and the breach of a different one.

Not only is the third party complaint defective in this respect, but its implications are astonishing, for the effect of the pleading, if successful, would be to impose upon one third party defendant liability under a warranty of fitness for a particular purpose of products sold by others to complainant. "Carbona" has mild cleansing properties when mixed with soap powders, and may be used with safety if care is exercised in application. But flame may cause explosion. Conceivably, a soap powder manufacturer would be willing to grant an express warranty that the admixture of his product will not increase the likelihood of mishap. But is it possible to infer from the sale of powder alone an *implied warranty* that it is safe when brought into contact with any substance with which the buyer chooses to mix it?

Complainant's position, therefore, violates the principle of warranty—contract. An implied warranty is a contract superimposed by law. Neither exists apart from a sale. A seller is liable for breach of warranty only in respect of the goods sold by him. A seller of nylon, e.g., cannot be held to impliedly warrant that a sweater containing 50% rayon and 50% nylon will contain those properties usually attributable to sweaters made entirely of nylon. He makes no implied warranty in respect of goods not sold by him and has no liability of any nature in respect of such goods.

> "Warranty is an incident of a sale. (Levis *v.* Pope Motor Car Co., 202 N. Y. 402; Pers. Prop. Law (Cons. Laws, Ch. 41, §93.)) The complaint negatives a sale by the defendant to the plaintiff and any contractual relation between the plaintiff and the defendant. There can be no warranty where there is no privity of contract. A cause of action for breach of warranty, either express or implied, is not, and cannot be, stated," *Turner* v. *Edison Storage Battery Co.*, 248 N. Y. 73, 74.

Similar conclusions apply to the claim of breach of warranty of merchantability. Each third party defendant is liable only for breach of its own implied warranty of merchantability. Merchantable quality has been defined as "good enough delivery to pass generally under that description after full examination." *McNeil & Higgins* v. *Czarnikow-Rienda,* 274 Fed. 397, 399 (D.C. S.D. N. Y. 1921); "Medium quality of goodness," *Howard* v. *Hoey,* 23 Wend. 350. See, also, *Grant Manufacturing Company* v. *Yates-American Machines,* 111 Fed. (2d) 360, 365 (C.A. 8th Cir., 1940), and Prosser, *The Implied Warranty of Merchantable Quality,* 21 Can. Bar J. 446, 458, et seq. (1943). There is no allegation in the amended third party complaint that the product manufactured and supplied by each individual third party defendant did not conform to these standards. "Merchantability" is not in the case.

Finally, a reading of the amended third party complaint reveals that the third party defendants sold their products under their respective trade names, "Oakite," "Pride," etc. Section 96(4) of the Personal Property Law, quoted *supra,* excludes an implied warranty of fitness for any particular purpose of a specified article sold under its patent or trade name.

In *Ellen* v. *Heacock,* 247 App. Div. 476 (4th Dept., 1936), the action was for damages for alleged breach of warranty in the sale of an oil burner known as a "Delco Oil Burner." Plaintiff relied on implied warranty of fitness. The Court, in holding for defendant, said at p. 478:

> "The subject of the sale was a 'Delco Oil Burner,' a specified article sold under its patent or trade name. Under such circumstances there can be no implied warranty as to fitness for any particular purpose."

See, also, *Bareham & McFarland, Inc.* v. *Kane,* 228 App. Div. 396 (4th Dept., 1930); *Ryan* v. *Progressive Grocery Stores, Inc.,* 255 N. Y. 388 (1931); *Collela* v. *Smith Fredenburg,* 239 App. Div. 274 (4th Dept., 1933), aff'd. 266 N. Y. 641; *Sure Seal Company* v. *Loeber,* 171 App. Div. 225 (1st Dept., 1916); *Bencoe* v. *McGraw,* 208 N. Y. Supp. 4 (1st Dept., 1925).

It is true, as pointed out in the opinion of Judge Clark below, that "the mere fact that the article happened to have a trade name does not, *per se,* bring the sale within its provision and, second, that even if it does the section does not necessarily exclude the warranty contained in the second subdivision." With respect to subdivision 4, admittedly the factual issue may arise, if properly pleaded, as to whether the purchase by brand name was such that the buyer relied on the seller's skill and judgment despite the purchase of a product having a brand name. The third party complaint, however, did not allege such reliance and, in fact, alleged that quantities of third party defendants' products were supplied "under the brand name[s]."

No proper breach of warranty has been pleaded and the Circuit Court should have affirmed the District Court's decision.

POINT II

No duty exists on the part of a manufacturer to warn of the consequences, if any, resulting from the mixing of his product with four other products over whose manufacture he has no control—local decisions are in conflict with the Circuit Court's holding below.

The Court below has said that it "cannot see that there is no legal basis in any event for a claim of liability" and that "upon the allegations before us, there would appear to be at least a possibility of liability against the suppliers for breach of warranty and against all the defendants for negligence as alleged. True, one naturally tends to view with some skepticism so unusual an accident, as well as the extensive claims made as to it." It is submitted that under any reading of the pleadings no claim for relief is stated.

In order to establish liability in tort for negligence there are four necessary elements:

1. Duty;
2. Failure to do what a reasonable man should have done or doing what a reasonable man should not have done;
3. Proximate cause;
4. Damage.

These principles are well set out in *Prosser on Torts,* at page 177. Prosser says:

> "1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.

"2. A failure on his part to conform to the standard required. These two elements go to make up usually what the courts have called negligence, but the term occasionally is applied to the second alone.

"3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause' or 'proximate cause.'

"4. Actual loss or damage resulting to the interests of another. * * *"

The manufacturing third party defendants contend that the third party complaint was properly held to be deficient by the District Court as to the second cause of action in that it certainly lacks the first and third of these elements and probably also lacks the second.

A. The Third and Fourth Party Defendants Violated no Duty, or Obligation, Requiring them to Conform to any Standard of Conduct for the Protection of Others against Unreasonable Risk. (Prosser's First Element.)

As indicated in our general discussion of negligence liability, *supra,* in order for there to be a liability of a manufacturer in this instance, there must be shown to have been a violation of a duty such manufacturer owed to the original plaintiff and/or the Grace Line. Whether or not such a duty exists is always a question of law for the court.

As Prosser puts it, at page 374:

"The determination of any question of duty—that is, whether the defendant stands in such a relation to the plaintiff that the law will impose upon him any obligation of reasonable conduct for the benefit of the plaintiff. This issue is one of law *and is never for the jury.*" (Emphasis supplied.)

The New York Court of Appeals is on all fours with this view. *Palsgraf* v. *Long Island Railroad Co.*, 248 N. Y. 339; see, also, *Morril* v. *Morril*, 104 N. J. L. 557, 142 A. 337; *Ship* v. *Fridenberg*, 132 App. Div. 782 (1st Dept., 1909); *Korn* v. *Capital Hall, Inc.*, 69 N. Y. S. (2d) 248 (App. Term, 1st Dept., 1947); *Kalinowski* v. *Joseph T. Ryerson & Son*, 272 N. Y. S. 759 (App. Div., 4th Dept., 1934).

Having thus determined that the general question of duty in a negligence action is one for the court, we now get down to a discussion of what duty is owed by a manufacturer to persons other than the immediate purchaser from the manufacturer.

The general proposition of law, from which we concede there has been considerable whittling over the years, is that a manufacturer is not liable in negligence for injuries resulting from the use of goods manufactured by him except to persons with whom he is in privity of contract. *Winterbottom* v. *Wright*, 10 M. & W. 109 (Ex. 1842). There have been numerous exceptions to that fundamental doctrine which have been considered by the courts of New York. Early in the famous case of *Thomas* v. *Winchester*, 6 N. Y. 397, the New York Court of Appeals held that a manufacturer could be held liable to persons not in privity with the manufacturer if the article involved was "inherently dangerous." (The commodity involved in the *Thomas* case, *supra*, was poison which had been improperly labeled.) With the passage of time, the category of "inherently dangerous things" became somewhat expanded, although nothing as harmless as a soap powder appears to have been determined to be inherently dangerous.

In the celebrated case of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, the Court extended the exception of

doctrine of the *Winterbottom* case, *supra,* to articles which, though not inherently dangerous themselves, were "reasonably certain to place life and limb in peril when negligently made." In addition to the doctrine of the *MacPherson* case, *supra,* another exception to the general proposition of the *Winterbottom* case, *supra,* is spelled out by a line of cases, representative of which is *Huset* v. *J. I. Case,* 120 Fed. 865. This exception one might term the "natural use" exception. A quotation from the *Huset* case, *supra,* puts clearly the meaning of the natural use doctrine:

> "* * * one who makes or sells * * * an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of sale."

The language used in the *Huset* case apparently has its derivation from the famous English case of *Heaven* v. *Pender,* 11 Q.B.D. 503 (C.A. 1882), where Brett, the Master of the Rolls, says:

> "Whenever one person supplies goods or machinery, or the like, for the purpose of being used by another person, under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary skill as to the condition or manner of supplying such things."

Except for these exceptions a manufacturer is not liable to a user with whom he is not in privity. That is: there is

no liability: (1) unless the product was "inherently dangerous" (soap powder is certainly innocuous—it is not a poison or an explosive) or (2) unless the product is "reasonably certain to place life and limb in peril when negligently made" (Swift's soap powder, to cite an instance, [unlike an automobile] is not reasonably certain to place life and limb in peril—and there is no allegation in the third party complaint that such soap was negligently made) or (3) unless the product causes injury when it is put to a use for which it was intended (it would appear crystal clear, we submit, to any person of common sense that Swift & Co., for instance, did not manufacture a soap powder [or that the Oakite Company did not manufacture "Oakite"] to be used in conjunction with lye, acid, and other things).

It therefore seems to us abundantly clear that the amended third party complaint in the second cause of action does not come within any of these exceptions to the general rule of the *Winterbottom* case. There is no pleading that the four products are inherently dangerous or that they were improperly made or that they were of such a nature as to be likely to cause damage if improperly made, and, from the face of the pleadings, they appear to have been used in a manner for which no reasonable man could have suspected they would be used.

Consequently, following our premise through its logical steps, it would appear there was no duty owing by the manufacturing third party defendants to the plaintiff or the third party plaintiff. There being no such duty there is no claim for relief stated.

B. The Accident Did Not Have Such a Reasonably Close Causal Connection with the Injury as to Make any Manufacturing Third Party Defendant's Conduct the Proximate Cause of the Alleged Injury. (Prosser's Third Element.)

As we have demonstrated above in our quotation from Prosser, in order for there to be recovery by either the plaintiff or the Grace Line against any manufacturing third party defendant, it must be shown that the conduct of such third party defendant was the proximate cause of the damage.

Assuming for the purpose of argument that the amended third party complaint contained language sufficient to allege proper proximate cause, we submit that even then the third party complaint would not state a claim upon which relief can be granted because from the face of the pleading the cause of the accident is demonstrated to be so remote from the harm that a reasonable man could not have anticipated that it would occur. We argue therefore for the proposition that there are circumstances in which the question of proximate cause is one for the court and not for the jury. These circumstances, which we submit are here present, are when it is clear that a reasonable man could not be expected to anticipate the harm because of its remoteness from the cause. Stated another way: When the cause is clearly not "proximate" the court and not the jury must decide. If it is true that there cannot be "negligence in the air" there should be a duty. Yet we have demonstrated there was no duty.

In *Odgis* v. *Popock,* 91 N.Y.S. (2d) 410 (Sup. Ct., 1949), plaintiff, a second hand car dealer, sued defendant in negligence. Defendant owned a car which was stolen

by a third party and which had been purchased by the plaintiff from the third party for $1,700. Plaintiff claimed that the defendant, who rented the car to the third party, was negligent for having failed to post a certificate on the car to the effect that it was bonded for rental as was required by statute. The court did not send the case to the jury but dismissed the complaint, and held that the defendant was entitled to judgment on the ground that the defendant's violation of the statute was not the proximate cause of the plaintiff's harm, since he was not chargeable with anticipating the third party's conduct. This proposition seems to us to be the more true in this case. The manufacturing third party defendants could not possibly anticipate the conduct of the plaintiff in mixing together his exotic combination of acids, caustic sodas, and whatnots. For similar cases where courts take the question of proximate cause away from a jury because of the remoteness of the causation from the harm, see *Ship* v. *Fridenberg, supra, Korn* v. *Capital Hall, Inc., supra, Kalinowski* v. *Joseph T. Ryerson & Son, supra.*

Grace Line contends that the allegation in their third party complaint to the effect that the third party defendants "knew or could have easily ascertained * * * that each of the products when mixed was dangerous and liable to explode," raises a question for the jury to determine. Petitioners contend that any state of facts proven under this allegation must of necessity be so remote as not to give rise to a cause of action. In other words, it still is past the boundaries of reasonableness to assume that any manufacturer or any person selling merchandise must take care to see that his product is not mixed with numerous other products.

As the court said in the *MacPherson* case, *supra,* at page 389:

> "There must be knowledge of a danger, not merely possible, but probable. *It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of contract.*" (Emphasis supplied.)

See also:

> *Bird* v. *St. Paul,* 224 N. Y. 47;
> *Schfranek* v. *Benjamin Moore & Co.,* 54 Fed. 2d, 76 (D.C. S.D. N.Y. 1931).

Assuming *arguendo* that it is true that when one of the products, such as Swift's soap powder, is mixed with appropriate quantities of lye, oxalic acid and Oakite an explosion occurs, then it must follow that the possibilities of this are so remote that the danger, in the words of the *MacPherson* case, is not "probable" but only "merely possible." Almost anything that is manufactured when mixed with something else can become an explosive. For instance, gun cotton consists of TNT and cotton. A suit by someone injured by an explosion of gun cotton against a Southern planter who raised the cotton, we think, has as much validity as the cause of action sought to be sustained here.

A related enunciation of the principle that the duty of a manufacturer is tempered by the relative probability of the damage complained of is contained in the case of *Kalfayan* v. *Compagnie Francais de Navigation a Vapeur,* 257 N. Y. 572, where it was held that one who purchased a washbasin which was intended to be used as a hand basin washed his feet in the basin and the basin broke there could be no recovery because the basin was used for a purpose other than that for which it was sold.

Further, it needs little authority to establish the legal principle that a tort-feasor is not liable for the consequences of unforeseeable intervening forces. *Quill* v. *Empire State Telephone & Telegraph Co.*, 159 N. Y. 1; *Reiss* v. *Kirkman & Son, Inc.*, 242 App. Div. 77.

As *Prosser on Torts* puts it, at page 364:

> "If the defendant can foresee neither any danger of direct injury, nor any risk from an intervening force, he is simply not negligent. Negligence cannot be predicated upon a failure to anticipate that extraordinary and unprecedented rainfall will flood the streets, that a pedestrian will slip and fall upon an apparently safe highway, that the wind will blow a door latch against the eye of a boy, or that a ribbon held across a street to stop a wedding procession will cause one carriage to run into another."

It is quite obvious from the state of the pleadings that none of the manufacturing third party defendants could ever have anticipated that all this mixing would go on. There are over a thousand soap powders and detergents on the market. Assume that each of these contains four chemical elements, and then consider the mathematical probability of just the right four coming into contact with one another under the proper circumstances and in the proper amounts so as to create an explosion of the type that is alleged to have occurred here. Is it foreseeable that any person would concoct such a witch's brew? Must everyone of the manufacturers of soap powders and detergents make chemical analysis of over a thousand of his competitor's products to determine whether the mixing of one or four or 702 of them will cause an explosion? The answer is simple: There just is no such foreseeability and hence no such liability.

C. Local Law is in Conflict With the Opinion Below.

The law of the State of New York seems clear that when different products are brought together, which products could not reasonably be expected to have been brought together, and the bringing together of these products causes an accident, that there is no recovery.

In *Boyd* v. *American Can Co.*, 249 App. Div. 644 (2nd Dept., 1936), the plaintiff was injured by using a key to open a coffee can and brought suit against the can manufacturer and the key manufacturer. The court denied liability as to either manufacturer. We quote the Appellate Division's memorandum in full, as it clearly enunciates our legal position heretofore taken in this brief:

> "EILEEN BOYD and DAVID BOYD, Respondents, v. AMERICAN CAN COMPANY, Sued Herein as AMERICAN CAN Co., Appellant, and Others, Defendants.—Order denying motion of the defendant American Can Company to dismiss the complaint reversed on the law, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Neither the can nor the key is inherently or imminently dangerous within the rule laid down in *MacPherson* v. *Buick Motor Co.* (217 N. Y. 382). Each is an appliance in ordinary use and not an article which, if imperfectly constructed, is reasonably certain to cause injury to a person using it. The appellant manufacturer may not be charged with negligence where some unusual result occurs that cannot reasonably be foreseen and is not within the compass of reasonable probability. It is not enough that in the intended use injury is possible. (*Cullem* v. *Renken Dairy Co.*, 247 App. Div. 742, and cases cited.) Young, Hagarty, Johnston, Adel and Taylor, JJ., concur."

See, also, *Traynor* v. *United Cigar-Whelan Stores*, 274 App. Div. 800 (2nd Dept., 1948), and the Massachusetts case of *Davidson* v. *Nichols*, 11 Allen 514 (1866).

D. The Only "Mixing" Case in the Second Circuit is Distinguishable.

We come now to a discussion of the case of *Pease* v. *Sinclair Refining Co.*, 104 Fed. (2d) 183 (C.C.A. 2nd, 1941), which is apparently relied upon by Grace Line and the court below. In the *Pease* case, *supra*, plaintiff, a chemistry teacher, in response to literature sent in by the defendant corporation, wrote the defendant asking that he be sent samples of petroleum products to use for demonstration purposes in his chemistry class. The defendant sent him what purported to be samples of various petroleum products, each of which sample contained a label with the name of the material supposedly contained therein. However, the label on one of the samples was improper so that one day while demonstrating the qualities of sodium and in order to show that sodium is well preserved in kerosene, plaintiff poured the contents of the bottle marked "kerosene" on to the sodium. In fact, the bottle did not contain kerosene and had been mislabeled. The result was an explosion and an injury to the plaintiff. The Circuit Court held that these facts constituted a cause of action. He who runs may read. There was negligent mislabeling in the *Pease* case and nothing remotely like what happened in the instant case. If the bottles were not mislabeled by the defendant corporation in the *Pease* case there would have been no explosion. Supposing the bottles in the *Pease* case were properly labeled? Supposing the chemistry professor put the wrong things together as the plaintiff apparently did here? Could the Court in the *Pease* case

have then said that there was a cause of action pleaded? Further, in the *Pease* case there was, in addition to the affirmative negligence in mislabeling, privity between the parties. In the instant case, in so far as the manufacturing third party defendants are concerned, there was no privity between the parties.

Further, in the *Pease* case it was reasonably to be anticipated that injury might result from the use of negligently labeled material in a potentially dangerous situation such as the chemistry class. Contrast that with the fact situation alleged in the third party complaint. Swift, for instance, did not mislabel anything. None of the manufacturing third party defendants supplied the product directly to the plaintiff. In addition we submit that this Court can take judicial notice that a soap powder is a universally used product sold to millions of people and is not intended to be used in combination with acids and lye. Ergo, since the matter of negligence here is one for the court and not for a jury, the court should now dismiss the complaint.

POINT III

In an action under the Jones Act, a third party plaintiff cannot implead third party defendants whose liability is governed by different rules of law.

The third cause of action alleged in the amended third party complaint seeks contribution from the third party defendants on the ground that they were joint tort-feasors and are jointly liable to plaintiff for his injury. The effect of this claim is to posit the third party defendants as targets for liability under the Jones Act.

Plaintiff has not elected to and could not elect to join third party defendants in his action under the Jones Act, since they were not his employers. *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783, 789-790 (1949).

The position is anomalous. The Jones Act is a special remedial or welfare statute, passed for the express purpose of affording relief to seamen when injured in the course of their employment by their "employers," and establishing a special standard of liability not obtaining elsewhere in the law of negligence. It eliminates the necessity for the plaintiff to prove his own freedom from contributory negligence. It eliminates further assumption of risk and negligence of a fellow servant as complete defenses by the employer. Federal Employers Liability Act, 45 U.S.C.A. 53 and 54; *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424 (1939); *Becker* v. *Waterman Steamship Corporation,* 179 F. (2d) 713 (C.A. 2nd, 1950); 46 U.S.C.A. §688. Under General Maritime Law (as distinguished from the Jones Act), still prevailing should an injured seaman elect to sue thereunder, there is no right of recovery for injuries to a seaman resulting in death. Further, assumption of the risk and the fellow servant rule are complete defenses.

Had plaintiff elected to proceed against the third party defendants, he could have done so only under the General Maritime Law and not under the Jones Act, since the relation of master and servant did not exist between plaintiff and third party defendants, and the defenses of assumption of the risk and of the negligence of a fellow servant would be available to the third party defendants. *The Osceola,* 189 U. S. 158, 175 (1903). Assumption of the risk and contributory negligence would be complete defenses at least to the extent of third party defendants' liability over to third party plaintiff. Even if Grace Line

had a substantial basis for its claim to contribution in a separate action against the third party defendants, it would be necessary for the Grace Line in its complaint to allege and prove that the plaintiff was not contributorily negligent, that he did not assume the risk of injury, and that his injury did not result from the negligence of a fellow servant.

Third party plaintiff and third party defendants cannot therefore be considered joint tort-feasors in an action against third party plaintiff under the Jones Act, since liability under the Jones Act is not common to third party plaintiffs and third party defendants. The test of the propriety of joinder is whether the parties claimed to be jointly liable are under a common duty to the person injured.

> "Joinder usually is permitted where it can be found that the defendants were under a common duty, as in the case of the fall of a party wall, or the failure of two defendants to keep property in repair." *Prosser on Torts,* Horn Book Series, Sec. 109, p. 1099, and cases cited therein.

In *American Mutual Liability Insurance Co.* v. *Matthews,* 182 F. 2d 322 (1950), the court pointed out that to constitute joint tort-feasors for purposes of contribution, a common liability must exist. At p. 323, the court said:

> "For a right of contribution to exist between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured."

The court cited A.L.I. Restitution §86; *Erie R. Co.* v. *Erie Transportation Co.,* 204 U. S. 220, 27 S. Ct. 246, 51 L. Ed. 450; *Lehigh Valley R. Co.* v. *Cornell Steamboat Co.,* 218 U. S. 264, 31 S. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas. 1235;

The Wonder, 2 Cir., 79 F. 2d 312; *Porello* v. *United States*, 2 Cir.; 153 F. 2d 605, 607 (dictum).

Third party plaintiff has a much more exacting duty to plaintiff created by statute than any duty owed plaintiff by the third and fourth party defendant-petitioners. It cannot be said, therefore, that third party plaintiff and third party defendants were under a common duty. They cannot be classified, therefore, as joint tort-feasors. Nothing in the Federal Rules of Civil Procedure has changed this substantive rule of liability.

The case of *Spaulding* v. *Parry Navigation Co.*, 90 F. Supp. 567 (S.D. N.Y., 1950), is the principal authority we can find dealing with this point in the Federal courts. It was held therein by I. Kaufman, J., in the District Court that a non-employer could be impleaded as a third party defendant and could be required to contribute in an action against the third party plaintiff under the Jones Act. On appeal to the Court of Appeals for the Second Circuit, Judge Kaufman was reversed in 187 Fed. (2d) 257 (C.A. 2nd, 1951) on the ground that this was not a proper case for contribution among joint tort-feasors. The injury not resulting from joint negligence, and therefore not giving rise to a common liability under the Jones Act, defeats third party plaintiff's right to contribution. *Ader* v. *Blau*, 241 N. Y. 7 (1925).

Since it could not have been intended by the framers of the Federal Rules of Civil Procedure to permit joinder in a situation where the substantive rules of liability do not warrant recovery by way of contribution, it is respectfully submitted that third party plaintiff's third cause of action fails to state a claim upon which relief can be granted.

POINT IV

The judgment below should be reversed in all respects.

Respectfully submitted,

LOWELL WADMOND,
Counsel for Petitioners.

LOWELL WADMOND,
DAVID HARTFIELD, JR.,
DONALD CRONSON,
JOHN W. BURKE, JR.,
BURTON H. BRODY,
EARLE J. STARKEY,
VINCENT A. CATOGGIO,
PAUL M. KLEIN,
WILBUR M. JONES,
I. ARNOLD ROSS,
WALTER E. WARNER, JR.,
BERNARD GOSTKOWSKI,
Of Counsel.

No. 399

Supreme Court of the United States

Office Supreme Court, U. S.
FILED
NOV 17 1951
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1951.

ALEJANDRO PABELLON,
Plaintiff-Respondent,

against

GRACE LINE INC.,
Defendant and Third Party
Plaintiff-Respondent,

against

COSTON SUPPLY COMPANY, RUDMAN & SCOFIELD, INC., DURKEE COMPANY, INC., DEARBORN CHEMICAL CO., OAKITE COMPANY and SWIFT & CO.,
Third Party Defendants-
Petitioners,

and

RUDMAN & SCOFIELD, INC.,
Fourth Party Plaintiff-
Petitioner,

against

McKESSON & ROBBINS, INCORPORATED and OLD BURY ELECTRO-CHEMICAL CO.,
Fourth Party Defendants-
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT.

Alejandro Pabellon, a seaman employed by Grace Line on the SS. *Santa Isabel*, alleges that he was injured by an explosion while cleaning aboard the vessel, which was caused while he was mixing together four commonly used

householding cleaning agents, namely, Pride washing Powder, Oakite, oxalid acid and caustic soda or lye. Grace Line has been sued by Pabellon, who alleges that Grace Line should have foreseen the result and warned him of the consequences of mixing the cleaners together. Grace Line has impleaded the manufacturers and suppliers under Rule 14 of the Federal Rules of Civil Procedure. The third party complaint alleges, in substance, that if Grace Line is to be held liable to plaintiff on such a theory, it should recover from the various third party defendants on the same grounds. The third party defendants moved to dismiss the third party complaint on the ground that it failed to state a cause of action. Grace Line also moved to dismiss the plaintiff's complaint on the same ground. Grace Line's motion was denied but that of the third party defendants was granted. Because of the non-finality of the order denying the motion to dismiss plaintiff's complaint, Grace Line could not appeal that order. It did appeal from the order dismissing the third party complaint and the Court of Appeals reversed. This petition is not concerned with the order denying Grace Line's motion to dismiss plaintiff's complaint, except insofar as it furnishes a criterion for the disposition of this petition for a writ of certiorari.

POINT I.

THE DECISION OF THE COURT OF APPEALS THAT THE THIRD PARTY COMPLAINT STATES A CAUSE OF ACTION IS INTERLOCUTORY AND NOT FINAL; THE ONLY QUESTION PRESENTED IS WHETHER THE THIRD PARTY COMPLAINT IS SUFFICIENT AS A PLEADING.

The order from which the appeal is taken holds that under the Federal Rules of Civil Procedure, the third party complaint sets forth claims upon which relief can be granted. It merely holds that as a matter of pleading, the

third party complaint is sufficient. Under established law, therefore, the order is non-final and does not determine any issues as between Grace Line and the third party defendants.

It is a well settled rule of this court that it will not exercise its power to review interlocutory orders or decrees except in extraordinary cases. This case does not call for the exercise of that power.

The third party complaint sets forth three claims for relief. The first is against the suppliers of the cleansers to Grace Line and is founded upon breach of warranty; the second claim is for indemnity from both the manufacturers and the suppliers, and is based upon theories of negligence; the third claim is based upon negligence under the maritime law wherein Grace Line seeks contribution from both the manufacturers and suppliers if it should be found that all are in joint fault.

The third party complaint more than meets the test defined in *Hickman* v. *Taylor*, 329 U. S. 495, 501, viz., that the task of a pleading is restricted to general notice giving. After reading the third party complaint, no one can doubt, and the third party defendants have had no difficulty in recognizing, the nature of the claims pleaded. The Court of Appeals, therefore, was correct in reversing the district court and in holding the Grace Line pleading sufficient.

See

Dioguardi v. *Durning*, 2 Cir., 139 F. 2nd 774;
Burt v. *City of New York*, 2 Cir., 156 F. 2d 791;
Bomar v. *Keyes*, 2 Cir., 162 F. 2d 136;
Chicago & N. W. R. Co. v. *Chicago Packaged Fuel Co.*, 7 Cir., 183 F. 2d 630;
Continental Collieries Inc. v. *Shober*, 3 Cir., 130 F. 2d 631;

Clyde v. *Broderick*, 10 Cir., 144 F. 2d 348;
Dennis v. *Village of Tonka Bay*, 8 Cir., 151 F. 2d 411;
Asher v. *Ruppa*, 7 Cir., 173 F. 2d 10;
Barron and Holtzoff, Federal Practice and Procedure, Sec. 255, 356;
Moore's Federal Practice, Sec. 12.08.

The petitioners assert in their brief that as a matter of law, it could not be foreseen that plaintiff would mix the various cleaners in such a way as to cause this unusual accident. They use such language as "The manufacturing third party defendants could not possibly anticipate the conduct of the plaintiff in mixing together his exotic combination of acids, caustic sodas and whatnots" (p. 21 of Petitioners' brief). "Is it foreseeable that any person would concoct such a witch's brew?" (p. 23 of Petitioners' brief). See also pages 19 and 20 of Petitioner's brief. It is true that the accident is bizarre and unusual. Yet, plaintiff seeks to hold Grace Line responsible on just such a theory. It would seem clear that if Grace Line can be held responsible to the plaintiff on that basis, the Grace Line, by a parity of reason, should be entitled to recover from the manufacturers and suppliers.

It is premature to decide as a matter of law that on the pleadings alone, the third party complaint does not state grounds for relief. That question can be decided only after a trial of the issues; and a trial may make the questions raised here moot.

POINT II.

THERE ARE NO MATTERS OF IMPORTANCE OR SPECIAL SIGNIFICANCE TO CALL FOR THE EXERCISE BY THIS COURT OF ITS DISCRETION TO ISSUE A PREMATURE WRIT OF CERTIORARI.

A. There are no important questions of federal law involved. There is no conflict between the Jones Act and the liberal third party practice provided by the Federal Rules of Civil Procedure.

B. The decision below as to the local law is not in conflict with decisions of the courts of the State of New York.

A.

This case is one involving a suit by a seaman against his ship owning employer under the Jones Act. 46 U. S. C. A. §688. Prior to the enactment of the Jones Act, a shipowner was not liable to its seamen for negligence. It was liable only for the unseaworthiness of the vessel and for the maintenance and cure of its sick and injured seamen. The Jones Act, by incorporating the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. §51, *et seq.*, made a shipowner liable to its seamen employees for negligence; negligence, however, based on common law theories. In other words, the Jones Act did not create new grounds of negligence as between seamen and employer, it merely made applicable to that relationship the old theories which had previously been applied to master and servant relationships ashore. At the same time, it abolished the defense of assumption of the risk, made the defense of contributory negligence one of mitigation rather than a complete bar as at common law, and wiped out the

fellow servant doctrine. It did not, as petitioners argue, prevent a seaman from joining in a Jones Act action against his employer, a third party action against one not his employer, if both actions were based upon the same injury and occurrence. Just because one of the defendants may be his ship owning employer, does not mean that the seaman may not join in one suit whatever claims he may have against third parties. A seaman's right to sue everyone responsible for his injury is not lessened by reason of the fact that one of his claims may be founded on the Jones Act. To hold otherwise would be to deprive a seaman of a substantial right. If the seaman can join such third parties, it follows that his employer can implead them.

It is true, as petitioners assert, that this court has never squarely passed upon that precise question but that is because it has never been supposed that a seaman had less right to so proceed than any other litigant.

It has been suggested that a Jones Act suit should be tried separately from a third party claim because of possible complication of issues for a jury, but with one known exception, the question has been decided adversely to the position taken by petitioners.

Spaulding v. *Parry Navigation Company,* 2 Cir., 187 F. 2d 257 pet. for cert. filed May 8, 1951, sub. nom. *Parry Navigation Co., Inc.* v. *Todd Shipyards Corp. No. 54.*

Jones v. *Waterman S.S. Corp.,* 3 Cir., 155 F 2d 992;

O'Neill v. *American Export Lines* (S. D. N. Y.), 5 F. R. D. 182;

Lawrence v. *Great Northern Ry. Co.* (D. C. Minn.), 98 F. Supp. 746;

Bohn v. *American Export Lines* (S. D. N. Y.), 42 F. Supp. 228;

Greenleaf v. *Huntingdon & B. T. M. R. & Coal Co.* (E. D. Pa.), 3 F. R. D. 24;

Culmer v. *Baltimore & O. R. Co.* (W. D. Pa.), 1 F. R. D. 765;

Newsum v. *Pennsylvania R. Co.* (S. D. N. Y.), 79 F. Supp. 225.

Contra, Ginsburg v. *Standard Oil Co.* (S. D. N. Y.), 5 F. R. D. 48. But compare, *Ginsburg* v. *Standard Oil Co.*, 5 F. R. D. 50, on reargument.

In an analogous situation this court has implied that there is no obstacle to a seaman's (longshoreman) joining a suit against a shipowner with one against a shipyard when the law governing recovery was different as to each defendant. *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85. In that case the court was dealing with unseaworthiness under the general maritime law. Under the maritime law, a shipowner impliedly warrants to seamen (longshoremen) that the vessel is seaworthy in all respects. In the *Sieracki* case, the vessel was found to be unseaworthy. *Sieracki* had sued the shipowner and also the shipyard which constructed the vessel. The lower court found the shipbuilding company to be negligent in failing to furnish a proper appliance. It also was held that, although the shipowner was free from negligence, it had breached its implied warranty of seaworthiness and, accordingly, it was held responsible to the injured longshoreman on that ground. In the course of its opinion, the court said at page 89:

> "Equally unavailable is the contention concerning the secondary character of petitioner's liability. That liability, if it exists, not only sounds in tort, but rests upon an entirely different basis from that upon which recovery has been had against the Bethlehem com-

panies. Such a liability therefore would be not joint but several and the judgment of the Court of Appeals obviously went on this view. Moreover the contention necessarily affects the Bethlehem companies, at any rate in relation to possible claim of indemnity by petitioner. They have not been named as respondents here or served in accordance with Rule 38 (3). Consequently we are precluded from making any determination concerning their rights or liabilities, with relation either to petitioner or to respondent."

This language clearly implies that the court found no procedural obstacle to permitting Sieracki to sue both the shipowner for breach of warranty of seaworthiness, and the Bethlehem Steel Company for negligence. It is true that the suit there was not a Jones Act suit but was one which arose under the maritime law. Under the doctrine of unseaworthiness, as under the Jones Act, contributory negligence mitigates but does not bar recovery.

The *Sieracki* case and the case at bar present parallel situations. In the *Sieracki* case, Sieracki could not have sued Bethlehem Steel for unseaworthiness. His remedy was limited to recovery for negligence. His contributory negligence would mitigate his damages as against the shipowner but would completely bar his right to recover from Bethlehem Steel.

In the present case, Pabellon could have sued both the Grace Line and the third party defendants for negligence. His contributory negligence will merely mitigate as against Grace Line but would be a complete bar against the third party defendants just as it would where a railroad employee sues his employer under the F. E. L. A., 45 U. S. C. § 51, and also joins a stranger in the same suit. *Lawrence* v. *Great Northern Ry. Co.* (D. C., Minn.), 98 F. Supp. 746.

The *Sieracki* case presented a more complicated situation because there, the right to recover against the ship-

owner was based on unseaworthiness unrelated to negligence, whereas the right to recovery against Bethlehem Steel was based upon negligence. Here, the liability as to Grace Line and the third party defendants rests on negligence alone.

In the lower courts, the difficulty conjured by the petitioners has been readily dealt with by the simple device of propounding special interrogatories to the jury. *Spaulding* vs. *Parry Navigation Company*, 2 Cir., 187 F. 2d 257, pet. for writ filed May 8, 1951, No. 54.

The third party procedure was intended to facilitate the trial of multiple claims in order to eliminate duplication of cost and expense, waste of the time of the courts and litigants and to prevent inconsistent results which might flow from separate trials.

There is no conflict, as the petitioners urge, between this third party practice, and a joint trial of a Jones Act suit with third party claims.

B.

The decision of the Court of Appeals for the Second Circuit does not conflict with the applicable local decisions.

This assertion, as related to the first cause of action, has no merit. Petitioners rely on subdivision 4 of Section 96 of the Personal Property Law of the State of New York. They overlook however, that subdivision 4 is modified by subdivisions 1 and 2 of that same section.

See *Foley* v. *Liggett & Meyers Tobacco Co.*, 136 Misc. 468, aff. 232 App. Div. 822;

Ryan v. *Progressive Grocery Stores, Inc.*, 255 N. Y. 388;

Horowitz v. *Bursens*, 198 Misc. 399.

Nor is there any conflict between the holdings of the Court of Appeals and local decisions as to the second and third causes of action based on negligence. Local decisions make it plain that a manufacturer may be liable to one not in privity with him under certain circumstances. Some of these circumstances are (1) where the product is negligently manufactured, (2) where it is inherently dangerous, and (3) where its intended use is likely to cause injury.

Campo v. *Scofield, et al,* 301 N. Y. 468;
Marcus v. *Specific Pharmaceuticals, Inc.,* 82 N. Y. Supp. 194;
See also *Lee* v. *Walworth Co.* (S. D. N. Y.), 1 F. R. D. 569;
Restatement of the Law of Torts, Sec. 388.

SUMMARY

The plaintiff's right to recover against Grace Line can be determined only after a full trial. Likewise, Grace Line's right to recover against the third party defendants can be determined only after there has been a trial of the issues. It is altogether possible, therefore, that a trial of the issues may completely dispose of the question which has been presented by this petition. At any rate, it is impossible to state that as a matter of law, the third party complaint fails to set forth grounds for relief.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED BECAUSE OF THE NON-FINAL CHARACTER OF THE ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND BECAUSE NO IMPORTANT OR EXTRAORDINARY ISSUES ARE PRESENTED BY THIS PETITION.

Respectfully submitted,

VERNON SIMS JONES,
Attorney for Respondent, Grace Line Inc.

JAMES B. MAGNOR,
Of Counsel.